

## CTAP CASELAW UPDATES<sup>1</sup> – FEBRUARY 2008

By Kelly A. Casillas, Legal Counsel  
Community Technical Assistance Program  
Montana Department of Commerce

### **Planning, Zoning and Subdivision Law**

***Bitterrooters for Planning, et al. v. Bd. of County Commissioners*** (Montana Supreme Court, DA 07-0617, on appeal from the District Court of the Twenty-First Judicial District of Montana, Ravalli County, February 7, 2008)

*Summary: Plaintiff organization claiming violation of constitutional right to know and right to participate in government, when County made a proposed settlement agreement available at, rather than before, the public hearing at which it was approved, failed to make sufficient showing for injunctive relief pending appeal. Plaintiffs failed to allege that its members did not understand the terms of the proposed settlement, that they had discovered any serious flaws or errors in the proposed agreement once produced to them, or that they had participated under a distorted perception of the facts.*

Before Ravalli County passed an interim zoning ordinance limiting subdivision density in the County to a minimum of one dwelling unit per two acres, certain developers had submitted subdivision applications to the County. Upon approval of the interim regulations, the applications were still awaiting review. The developers filed a federal civil action against the County, alleging damages stemming from the County's refusal to process subdivision applications under the rules applicable prior to the County's enactment of the interim zoning regulations.

The parties began settlement negotiations, and on June 4, 2007, the Commission held a public hearing to consider a proposed settlement agreement. The agreement provided that the applications would be processed by the County in accordance with the rules and regulations in place prior to the enactment of the interim zoning regulations, but did not guarantee approval of any of the proposed subdivisions. In return, the plaintiff developers agreed to waive their damage claims and claims for attorney fees. The draft agreement was not available prior to the hearing, but hard copies were provided at the hearing for review, comment, and consideration by the public and the Commissioners. The hearing lasted for most of the day, and continued to the following day for a decision. A member of the organization submitted comments on the proposed agreement by email to the Commission the night of June 4, 2007. On June 5, 2007, the Commission approved a modified draft of the settlement agreement; that same day, three new Commissioners were elected and one sitting Commissioner was unseated. No members

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of the organization were present at the June 5, 2007 hearing. The following day, the agreement was filed in federal court and the suit was dismissed. On June 13, 2007, the new Commissioners were sworn into office, and the next day, plaintiff citizen organization filed suit seeking to void the settlement agreement.

Plaintiff claimed its members were denied their constitutional right to know and right to participate in government because of the County's failure to provide a reasonable opportunity to view the proposed agreement prior to the hearing. The Plaintiff sought a preliminary injunction to stop implementation of the agreement until the court ruled on its claims, which was denied by Judge Langton in August, 2007. Plaintiffs then filed a motion for injunction pending appeal of that decision, which was ultimately denied by Judge Langton on December 3, 2007 and appealed by plaintiff to the Montana Supreme Court.

The Supreme Court upheld the district court's order denying the plaintiff's motion for injunction pending appeal. The Court agreed that the plaintiff had not demonstrated a likelihood that it would succeed on the merits of its substantive constitutional claims, as it had not alleged that its members failed to understand the terms of the proposed settlement, that they had discovered any serious flaws or errors in the proposed agreement once produced to them, or that they had participated under a distorted perception of the facts. (Citing *Bryan v. Yellowstone County Elementary Sch. Dist. No. 2*, 2002 MT 264.) Further, the plaintiff failed to make a sufficient showing that implementation of the agreement would cause irreparable injury to the organization or its members, as opposed to the County or public as a whole. Finally, the Court agreed that the organization failed to make a sufficient showing that the Board would take some act during litigation that would render a judgment ineffectual.

Justice Nelson dissented from the ruling, noting that the recent decisions in *Henesh v. Board of Commissioners*, 2007 MT 335, and *Povsha, et al. v. City of Billings*, 2007 MT 353 (see CTAP Legal Updates, December 2007) – where the Court found the plaintiffs' substantive claims moot when no injunction had been obtained – have “tipped the scales of justice in favor of the appellee and against the appellant.” Justice Nelson calls for a policy of liberally construing motions for injunction pending appeal, where any doubt as to the appropriateness of a request for injunctive relief should be resolved in favor of the movant.

Plaintiff's appeal of Judge Langton's August, 2007 denial of its motion for a preliminary injunction is now pending before the Montana Supreme Court.

## **Water Law**

***Serena Vista, LLC v. Mont. Department of Natural Resources and Conserv.*** (Montana Supreme Court, 2008 MT 65, on appeal from the District Court of the Twenty-First Judicial District of Montana, Ravalli County, February 26, 2008)

*Summary: DNRC's adoption of administrative rules defining "place of storage" as a "reservoir, pit, pit-dam, or pond" renders moot a challenge to agency's use of that same definition prior to its adoption as a rule.*

The DNRC received complaints that Plaintiff ranching corporation was improperly storing water in a pumping pit on its property, adversely affecting adjacent property owners' water rights. DNRC investigated the situation, and ultimately issued a notice of violation to plaintiff for creating a "place of storage" and changing a point of diversion without DNRC approval. Plaintiff sought declaratory relief against the DNRC, claiming that DNRC had not properly promulgated an internal agency policy defining "place of storage" as a pumping pit providing a volume of water larger than that necessary to supply the immediate need of pump capacity.

The district court dismissed the case for failure to exhaust administrative remedies, and before the case reached the Montana Supreme Court the DNRC promulgated an administrative rule defining "place of storage." The Supreme Court refused to reach the merits of the case, finding the controversy moot because the new regulations applied to plaintiff's activities and plaintiff had agreed to comply with all properly adopted rules and regulations.

## **Environmental Law**

***Pacific Merchant Shipping Association v. Goldstene, et al.*** (9<sup>th</sup> Circ., on appeal from the United States District Court for the Eastern District of California, February 27, 2008)

*Summary: Rules promulgated by the State of California limiting emissions from the on-board auxiliary engines of marine ships operating within 24 miles of the state's coastline are preempted by the federal Clean Air Act.*

The 1990 amendments to the Clean Air Act (CAA) specifically addressed regulation of non-road sources, including marine vessels. The amendments preempted state regulation of emissions from specified non-road sources, but provided that California could seek authorization from the EPA to "adopt standards and other requirements relating to the control of emissions" from non-road vehicles or engines. Without seeking such authorization from EPA, the state of California promulgated Marine Vessel Rules, limiting the emissions of particular matter, nitrogen oxide, and sulfur oxide from the on-board auxiliary power engines of ocean-going vessels within 24 miles of the California coast. California argued the rules were "in-use requirements" regulating the types of fuel used by the marine vessels; "in-use" rules regulating the use, operation, or movement of road and non-road vehicles are not preempted by the CAA.

The plaintiff shipping association filed suit against California, arguing that the rules were invalid because the state failed to obtain the EPA authorization required under the CAA prior to their adoption. The district court granted the plaintiff's motion for summary judgment, finding the rules to be state emissions standards preempted by the federal CAA, "because the regulations set numerical requirements for the reduction of emissions relating to particular emissions rather than a fleet as a whole." The appellate court upheld the judgment, finding that the CAA "creates a sphere of implied preemption surrounding those regulations for which California must obtain authorization." The Ninth Circuit adopted the holding of *Engine Mfrs. Ass'n v. U.S. Env'tl. Prot. Agency*, 88 F.3d 1075, 1078 (D.C. Cir. 1996) ("EMA"), that Section 209(e)(2) of the CAA (implied preemption of state emissions standards) applies to both new and non-new engines. Because California failed to obtain federal authorization to adopt emission standards for on-board auxiliary power engines of non-road marine vessels, the rules are preempted by the CAA.

### **Real Property Law**

**Nelson, et al. v. Barlow** (Montana Supreme Court, 2008 MT 68, on appeal from the District Court of the Twentieth Judicial District of Montana, Lake County, February 26, 2008)

*Summary: A grant of an easement must be clear and unambiguous as to the extent of the use of the easement, and the owner or purchaser of the burdened property must be put on sufficient notice of the easement, either through language in the deed, reference in the subdivision plat or certificate of survey, or by otherwise establishing the property owner's knowledge of the easement.*

In a dispute between two property owners on Flathead Lake, plaintiff claimed that the deed to his inland lot ("together with roadway easement as shown on Certificate of Survey No. 4377 for access to Lot 8 of Cedar Hills Subdivision") granted him an easement across defendant's lakeside lot (Lot 8) for recreational use and enjoyment of the lake. Such language was not reflected in defendant's deed, and the district court held that the deed was clear and unambiguous that "access to Lot 8" in plaintiff's deed provided access to Lot 8, but not across, over or through the lot to access the lake.

The Montana Supreme Court disagreed with the district court, finding "access to Lot 8" to be susceptible to two reasonable but conflicting meanings; (1) access to get to the lot's boundary via the road depicted on the survey; or (2) access to go onto that lot for the purpose of reaching the lake. Nevertheless, the Court upheld the district court ruling on different grounds, finding that the defendant could not be bound by the easement because: (1) the encumbrance was not in his chain of title; (2) the encumbrance was not referenced in the subdivision plat, and (3) the plaintiff had not alleged defendant otherwise had knowledge of the easement. At least one of these would have to be established in order to put the defendant on sufficient notice that his property was burdened by an easement.

**Roe Family, LLC v. Lincoln County Bd. of Commissioners, et al.** (Montana Supreme Court, 2008 MT 70, on appeal from the District Court of the Nineteenth Judicial District of Montana, Lincoln County, February 26, 2008)

*Summary: The location of a road used by landowners to access their property across a neighbor's private property was sufficiently consistent with the historical location of an un-abandoned county road in the vicinity to establish that the roads were one and the same.*

Plaintiff landowners had accessed their property for over 40 years by a road connecting to an established public highway via their neighbor's property. After the neighbor blocked use of the road, plaintiffs sought a writ of mandate directing the County to act to keep the road open as an established County road created in 1906, though the location of the existing road and the earlier road were different.

The Montana Supreme Court upheld the decision of the district court, finding the evidence as a whole – including the undisputed testimony of licensed land surveyor expert witness and the public maps of the area – demonstrated that the location of the road was sufficiently consistent with the established 1906 county road to establish that it was the same public road.